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Supreme Court, U.S.
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No. 98-1800

IN THE
Supreme Court of the United States

PHILADELPHIA, BETHLEHEM AND
NEW ENGLAND RAILROAD COMPANY,

Petitioner,

v.

DAVID NEWHARD,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District Court abused its discretion by applying the Federal Rule of Evidence 403 balancing test and this Court's ruling in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963), in precluding introduction of plaintiff's pension benefits and Railroad Retirement Act disability benefits?

2. Whether this Court's decision in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963) supports the District Court's discretionary ruling that evidence of plaintiff's receipt of pension benefits and disability benefits have a substantial likelihood of prejudicial impact?

3. Whether this Court's decision in *Norfolk & Western Railway Co. v. Leipelt*, 444 U.S. 490 (1979) should be extended to offset plaintiff's lost wages by Railroad Retirement Board taxes?

4. Whether this matter is now moot due to the parties settlement agreement and payment by PB&NE to plaintiff in the amount of the Judgment plus interest and costs?

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The Opinion of the Third Circuit Court of Appeals affirmed rulings made by the District Court in excluding evidence of David Newhard's receipt of pension benefits and Railroad Retirement Act disability benefits. The Court of Appeals held that *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963) and its progeny supported the District Court's conclusion that pension benefits and Railroad Retirement Act disability benefits are barred by the collateral source rule. In addition, the Court of Appeals found that since the District Court applied the Rule 403 balancing test to exclude plaintiff's receipt of pension and disability benefits, the lower court's decision is supported by this Honorable Court's decision in *Eichel*. Furthermore, the Court of Appeals properly held that this Court's decision in *Norfolk & Western Railway Co. v. Leipelt*, 444 U.S. 490 (1980) should not be extended to include a deduction for Railroad Retirement Board taxes to offset wages. *See* Opinion of the Honorable Judge Lewis of the Third Circuit Court of Appeals, attached as Appendix "A", to Petitioners' Writ of Certiorari.

STATEMENT OF THE CASE

On June 17, 1996, Respondent, David Newhard (hereinafter "Newhard"), brought this action against his employer, Petitioner, Philadelphia, Bethlehem & New England Railroad (hereinafter "PB&NE"), for relief under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* (FELA). Newhard sought to recover damages for severe injuries suffered in the course of his railroad employment with PB&NE. Newhard was employed by PB&NE as a conductor. On February 2, 1995, Newhard was

thrown from his train and seriously injured when the train he was riding on was forced to make a sudden stop to avoid a collision with another train which employees of PB&NE had sent moving toward Newhard's train on the same track.

Prior to trial, the District Court was presented with several Motions in Limine. Relevant to the instant Writ of Certiorari was PB&NE's Motion for permission to introduce evidence that Newhard received pension benefits. The District Court denied this Motion. Another Motion made by PB&NE was to allow the Railroad to introduce evidence that plaintiff receives a Railroad Retirement Board Disability Annuity. This Motion likewise was denied. Newhard also filed a Motion to Preclude PB&NE from offering into evidence any information with regard to Newhard's disability benefits under the Railroad Retirement Act, pension benefits which he received through a collective bargaining agreement with his Union and Newhard's retirement. Plaintiff's Motion was granted by the Trial Judge, who relied upon *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963), and its progeny which precludes evidence of collateral benefits whether such evidence is presented during the liability or damage phase of an FELA trial. Furthermore, the District Court excluded the aforementioned evidence of pension benefits and Railroad Retirement Act disability benefits, specifically indicating that the admission of such evidence was more prejudicial than probative, pursuant to Federal Rule of Evidence 403[1] (J.A. 76, 79-81) (App. 2a, *infra*).

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1. Respondent cites to the Joint Appendix ("J.A.") that was before the Third Circuit as allowed by Supreme Court Rule 12.7 to support the factual statements made herein.

The case was tried before The Honorable Franklin S. VanAntwerpin in the United States District Court for the Eastern District of Pennsylvania, commencing on June 2, 1997. Plaintiff presented numerous witnesses on his behalf, including but not limited to, medical expert testimony, vocational rehabilitation expert testimony and an actuary and economic consultant. On re-cross examination of Newhard's expert economist, PB&NE's counsel attempted to question said expert on the effects of the Railroad Retirement tax. This area of questioning was properly excluded by the District Court. The actuary hired by Newhard, whose testimony was not refuted by an expert for the AB&NE, took into account, the effect of income taxes on Newhard's past and future lost wages as required by this Court's ruling in *Norfolk & Western Railway Co. v. Leipelt*, 444 U.S. 490 (1979) (J.A. 400-404, 422-424).

On June 5, 1997, the Jury returned a verdict in favor of Newhard in the amount of Six Hundred Thirteen Thousand Six Hundred Seventy-Six ($613,676) Dollars. The court thereafter molded the verdict due to the fact that Jury found Newhard five (5%) percent comparatively negligent and entered Judgment on the verdict in the amount of Five Hundred Eighty-Two Thousand Nine Hundred Ninety-Two Dollars and twenty cents ($582,992.20). After trial, the District Court denied PB&NE's Motion for a New Trial on several grounds that were not included in PB&NE's appeal to the Third Circuit or the Petition for Writ of Certiorari.

The Third Circuit Court of Appeals affirmed the decision of the District Court on February 9, 1999. The Third Circuit found that *Eichel*, and its progeny prohibits the admission of Railroad Retirement Act (RRA) Disability Benefits and the court held that insofar as the District Court

applied the Rule 403 balancing test to exclude pension benefits and Railroad Retirement Act disability benefits, this ruling is supported by this court's recognition that collateral source has a "substantial likelihood of prejudicial impact". *Eichel*, 375 U.S. at 255. Since there was not an abuse of discretion or misapplication of the law, the Court of Appeals refused to disturb the District Court's discretionary ruling in excluding Newhard's pension benefits and RRA disability benefits. It should be noted that at no time did counsel for PB&NE offer factual evidence or submit the terms of Newhard's retirement pension plan to the District Court below.[2] Further, there was no testimony concerning the terms of the Collective Bargaining Agreement, since it was not a plan designed for a set off for damages in an FELA case.

PB&NE also argued to the District Court that it should have been allowed, on re-cross-examination of Newhard's actuary to raise the question of the effects of Railroad Retirement tax (which, in effect, is the Railroader's Social Security Tax) on plaintiff's past and future wage loss calculation (J.A. 423-424). The Third Circuit rejected this argument stating that the Railroad Retirement Board (RRB) (taxes), unlike income taxes, affects the amount of pension benefits a Railroad employee actually receives upon retirement. The Third Circuit declined to extend this Court's decision in *Leipelt*, 444 U.S. 490 (1979).

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2. PB&NE on page 2, 3, and 5 of its Petition for Writ of Certiorari attempts to outline the terms of the pension under Newhard's Collective Bargaining Agreement. It should be pointed out that the Collective Bargaining Agreement itself setting forth the pension plan, or any factual testimony regarding same was never submitted into evidence at the time of trial. Therefore, such statements of counsel have no factual support.

The Third Circuit affirmed that the District Court had not abused its discretion by excluding Newhard's retirement and receipt of a retirement pension. The Court of Appeals upheld this Court's ruling in *Eichel*, and refused to disturb the District Court's ruling insofar as the District Court did the balancing test required under Federal Rule of Evidence 403. Furthermore, the Third Circuit concluded that the payment of income taxes and the payment of the Railroad Retirement tax differ fundamentally and declined to extend this Court's holding in *Leipelt*.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT PROPERLY EXCLUDED EVIDENCE OF NEWHARD'S RETIREMENT PENSION AND DISABILITY PENSION FROM THE RAILROAD RETIREMENT BOARD.

This Honorable Court should deny review of this matter since the District Court and Circuit Court properly precluded evidence of Newhard's disability pension and retirement pension under longstanding federal case law on the issue on the inadmissibility of collateral benefits. Furthermore, the Circuit Court refused to disturb the District Court's discretionary ruling under Federal Rule of Evidence 403. This Court's opinion in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963), held that in an action under the FELA, the evidence of a Disability Pension payment was inadmissible either as bearing on the extent or duration of

the injury, or to show a motivation for not returning to work.[3] The Court held:

> In our view, the likelihood of misuse by the jury [of such evidence] clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes that the receipt of disability benefits . . . were considered as evidence of malingering by an employee asserting a claim under the [FELA]. We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. *Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34 (1963). It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact.

Eichel, 375 U.S. at 255.

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3. This Court has also precluded admission of collateral sources of benefits in analogous Jones Act cases due to the prejudicial nature of such evidence. *Tipton v. Socony Mobile Oil Co.*, 375 U.S. 34 (1963).

Circuit courts have consistently held that *Eichel* precludes admission of collateral benefits, whether such evidence is presented during the liability or damage phases of the trial. *See, e.g., Green v. Denver and Rio Grande Western Railway Co.*, 59 F.3d 1029, 1032-33 (10th Cir. 1995), *cert. denied*, 516 U.S. 1009 (1995) ("*Eichel* compels the conclusion that the collateral source rule prohibits admission of Railroad Retirement Act disability benefits in an FELA case"); *Reed v. Philadelphia, Bethlehem & New England Railroad Co.*, 939 F.2d 128, 134 (3rd Cir. 1991) (finding that the trial court improperly allowed the defense to argue that the plaintiff was receiving disability payments), *cert den.*, 113 S. Ct. 1584 (1993); *Sheehy v. Southern Pacific Transportation Co.*, 631 F.2d 649, 652 (9th Cir. 1980) ("a discretion normally applicable to admit all relevant evidence of collateral benefits is greatly limited in FELA cases"). *Page v. St. Louis Southwestern Railroad Co.*, 349 F.2d 820 (5th Cir. 1965) (precluding the admission of evidence of a railroad pension to show that an elderly employee would have retired even absent the injury); *Haughton v. Blackships, Inc.*, 452 F.2d 788 (5th Cir. 1972) (declining consideration of a seaman's maritime pension in mitigation of damages on the theory that the pension was a benefit directly attributable to the employer under the collateral source rule when all the monies in the retirement fund was contributed by the employer). The court in *Haughton* found that the contract was in the nature of a fringe benefit or deferred compensation and, thus, was not established by the employer for the purposes of indemnifying itself against liability. The court in *Haughton*, concluded that the source of the funds may be determined to be collateral or independent even though the employer tortfeasor supplies such funds. 452 F.2d at 790.

The PB&NE also erroneously suggests that there is disagreement between the Circuits which needs to be resolved by this Court. In support of their position, PB&NE cites *McGrath v. Consolidated Rail Corporation*, 136 F.3d 838 (1st Cir. 1998) (indicating that *Eichel* does not mandate a *per se* bar of employer related payments in FELA cases). The court in *McGrath* applied the 403 balancing test considering evidence of such benefits. The District Court in the instant matter applied the same Rule 403 balancing test and concluded that such evidence of Newhard's receipt of pension benefits and disability benefits were more prejudicial than probative and therefore should not be admitted at the time of trial (App. 2a, *infra*). This discretionary ruling by the District Court should not be disturbed absent an abuse of discretion since the decision is clearly in accordance with this Honorable Court's opinion in *Eichel*. This Court in *Eichel* conclusively determined that Railroad Retirement Act disability payments to an injured employee cannot be used to off-set the employer's FELA liability. *Eichel*, 375 U.S. at 254, 255.

As this Honorable Court stated in *Eichel*, the Railroad "does not dispute that it would be highly improper for the disability payments to be consideration in mitigation of damage suffered by" the injured employee. 375 U.S. at 254. In the instant case, counsel for PB&NE, with regard to his attempt to admit Newhard's receipt of Railroad Retirement Act disability benefits, stated that he was not using the receipt of disability benefits and pension benefits to show malingering in this case (J.A. 73). However, the Jury may have used evidence of pension benefits improperly and made a finding of no liability on the Railroad due to the fact that Newhard was already receiving some form of compensation.

In *Tipton v. Socony Mobile Oil Co. Inc.*, 375 U.S. 34 (1963), this Court did not limit the application of the collateral source rule to the damage phase of the trial noting that the Jury in that case was led to place undue emphasis on the availability of compensation benefits in determining a liability issue (whether Plaintiff was a seaman within the Jones Act) 375 U.S. at 38. Therefore, *Eichel* and *Tipton* preclude admission of collateral benefits, whether presented during the liability or damage phase of a trial.

This Honorable Court has recently denied Certiorari on the same identical issue that Petitioner raises here. In *Green v. Denver and Rio Grande Western Railway Co.*, 59 F.3d 1029 (10th Cir. 1995), *cert. den.*, 516 U.S. 1009 (1995). The Circuit Court in *Green* asserted that *Eichel* decided the issue against off-set of damages. The court in *Green* followed *Eichel* and stated:

> As plaintiff asserts *Eichel* compels the conclusion that the collateral source rule prohibits admission of RRA disability benefits in an FELA case. The narrow issue in *Eichel* was whether evidence of RRA disability payments was admissible to show malingering by the plaintiff. The Supreme Court stated that "the likelihood of misuse by the jury clearly outweighs the value of this evidence" and noted that it had collateral benefits is readily subject to misuse by the jury.

Id. at 255 (citing *Tipton v. Socony Mobil Oil Corp.*, 375 U.S. 34 (1963)).

The Tenth Circuit in *Green* was also persuaded by the decisions of several other Circuits which determined that admission of collateral source payments was not harmless. *Phillips v. Western Co. of N. America*, 953 F.2d (5th Cir. 1992). *Reed v. Philadelphia, Bethlehem & New England Railroad Co.*, 939 F.2d 128, 134 (3rd Cir. 1991), *cert. den.*, 113 S. Ct. 1584 (1993).

Similar to *Green* case, the Third Circuit Court of Appeals in the instant matter concluded that *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963) and its progeny support the District Court's conclusion that Newhard's pension and Railroad Retirement Act disability pension are barred by the collateral source rule. Furthermore, the Third Circuit in the instant case also held that insofar as the District Court applied the Rule 403 balancing test to exclude this evidence, "we find that its decision is supported by the Supreme Court's recognition that collateral source evidence has a 'substantial likelihood of prejudicial impact.' " *See* Opinion of Circuit Judge Lewis, page 5 and 6, attached as Appendix "A" to Petitioner's Writ of Certiorari.

Even the case cited by PB&NE in support of its position, *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838 (1st Cir. 1998). The defendant railroad did not even ask the court to rule that Railroad Retirement Act disability benefits could be used to reduce the defendant's liability under the FELA. The court in *Green*, 59 F.3d at 1029, in reaching the result it did, did more than just rely on *Eichel*; it also analyzed cases involving similar sources of compensation, and concluded that the law is clear and such sources cannot be used by the PB&NE to reduce their liability. Furthermore, Petitioner improperly relies on *EEOC v. Wyoming Retirement Systems*, 771 F.2d 1425 (10th Cir. 1985), which

is an age discrimination case where there was no danger of prejudicing a jury with such evidence of benefits received. *Eichel* and its decisional progeny, clearly exclude evidence of Newhard's receipt of collateral benefits, such as his railroad pension and disability pension.

II.

NEWHARD'S COMPANY PENSION WAS PROPERLY EXCLUDED BY THE DISTRICT COURT UNDER THE COLLATERAL SOURCE RULE AND FEDERAL RULE OF EVIDENCE 403.

The Petitioner also argues that since PB&NE was the sole source of the pension benefits, that same are not collateral. This argument is completely without merit under the Federal Employers' Liability Act. In cases analyzing this subject, the courts have consistently ruled that the collateral source rule applies even when the employer is the sole source of the fund. The important consideration is the character of the benefits received rather than when the source is actually independent of the employer. *Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir. 1984); *Haughton v. Blackships, Inc.*, 452 F.2d 788 (5th Cir. 1972); *see also United States v. Price*, 288 F.2d 488 (4th Cir. 1961). Therefore, the mere fact that the employer was the sole source of the fund, does not mean that it is not a collateral source subject to exclusion under the longstanding collateral source rule in FELA cases.[4]

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4. PB&NE did not attempt to enter into evidence the Collective Bargaining Agreement it negotiated between itself and the Union representing Newhard. It is submitted that said Collective Bargaining Agreement did not provide for an off-set of PB&NE's (Cont'd)

In *Clark*, 726 F.2d at 448, the agreement in that case was submitted into evidence by defendant's counsel which allowed the Trial Judge to make a correct ruling. The policy in question in *Clark* contained a clause allowing a set-off from any settlement or other payment on account of plaintiff's injuries. 726 F.2d at 449. PB&NE did not submit the Collective Bargaining Agreement in the instant matter since no language permitting a set-off is contained therein. In order to have a set-off from an FELA damage award, PB&NE's contract with the employee has to have a specific provision permitting said set-off similar to the one in *Clark*. As stated in *Clark*, the benefit in question must be meant to indemnify the employer against possible liabilities under the FELA. 726 F.2d at 450. 45 U.S.C. § 55 specifically prohibits any contract, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created under the FELA. Since the Collective Bargaining Agreement setting forth the pension benefits in the instant matter nor any other agreement concerning Newhard's receipt of pension benefits was not entered in the record in this case, no set-off can be permitted.

Similarly, in *Haughton v. Blackships, Inc.*, 452 F.2d 788 (5th Cir. 1972), a boat swain brought an action for personal injuries and a question arose in computing damages payable to a seaman whether it was improper to consider the seaman's maritime pension in mitigation of damages on the theory that the pension was a benefit directly

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(Cont'd)
FELA liability by pension payments made to Respondent. PB&NE cannot unilaterally alter its contract with the Union to provide a provision not negotiated on or agreed to. The Railway Labor Act, 45 U.S.C. §§ 152, 156 establishes the exclusive method for altering an existing contract.

attributable to the employer under the collateral source rule where all of the money in the retirement fund was contributed by the employer. The fund was established by virtue of a contract between the employer and the Union. (The exact same type of retirement plan in the instant matter). The court found that the contract was in the nature of a fringe benefit or deferred compensation and, thus, was not established by the employer for the purposes of indemnifying itself against liability. The Fifth Circuit in *Haughton*, concluded that the source of the funds may be determined to be collateral or independent even though the employer tortfeasor supplies such funds. 452 F.2d at 790. The reasoning in *Haughton* was also followed in the case of *Russo v. Matson*, 486 F.2d 1018 (9th Cir. 1973), where evidence of pension benefits received by an employee were excluded by application of the collateral source rule citing *Haughton*, 452 F.2d at 788, and *Hall v. Minnesota Transfer Co.*, 322 F. Supp. 92 (D. Minn. 1971).

The PB&NE also fails to point out to this Court that Newhard's acceptance of the company pension was his right irrespective of his injury. In attempting to cross-examine the Newhard, the record revealed that Newhard was entitled to his pension as a result of his employment with the PB&NE for thirty (30) years. (J.A. 245-247). It was then, a benefit that he has already earned through years of service to the PB&NE, as opposed to a future right to continued employment.[5] PB&NE never submitted the company's pension plan to the court as a part of the record and cannot now, submit, in argument, the terms of the plan. In *Ward v.*

5. PB&NE now seeks to diminish the compensation for injuries Mr. Newhard suffered as a direct result of their negligence because of benefits Mr. Newhard earned through thirty years of service to the railroad.

Union Barge, 443 F.2d 565 (3rd Cir. 1971), defendant, in a case involving maintenance and cure to a seaman, attempted to argue that it was entitled to a credit based upon a Collective Bargaining Agreement. The court held that, since the contract had never been put into the record, it was presumed that it was not entitled to a credit. *Id.* at 572. Here, PB&NE makes many arguments about the contents and terms of the agreement in question without having submitted it into the record. This attempt, of course, is improper.[6] Moreover, counsel for PB&NE admitted to the court that Newhard was entitled to this benefit under any circumstances (J.A. 244). Thus, the pension benefit was a vested right at the time of his injury, and not a future contingency.

There is another reason for ignoring the pension benefits in calculating damages under the FELA. In determining whether payments under an employee benefit plan should reduce the PB&NE's liability, courts have focused on whether the plan expressly provides for such reduction. If it does not, courts are uniform in rejecting the use of pension payments to reduce an employer's liability. Perhaps no better expression of this rule is found than in *Davis v. Odeco, Inc.*, 18 F.3d 1237, 1244 (5th Cir.), *cert. den. sub nom., Murphy Exploration and Products Co. v. Davis*, 513 U.S. 819 (1994):

> Generally speaking, when an employee has bargained for a fringe benefit as additional consideration for employment, compensation received by the employee under that fringe

6. The record in this matter is flawed due to the fact the collective bargaining agreement in question was never introduced as evidence in the District Court.

> benefit should not be deducted from damages awarded to the employee as a result of the employer's negligence. As the employee is already contractually entitled to that benefit, allowing the employer to deduct such compensation would both compensate the employee and provide the employer with an undeserved windfall. Thus in evaluating whether a benefit derives from a collateral source, we ordinarily assess that whether that benefit is in the nature of a fringe benefit (or deferred compensation) or instead reflects a tortfeasor's effort to anticipate potential liability.

The pension fund from which Newhard received payment certainly was not established with the tort liability of the Railroad in mind. It came about as the result of negotiations with the Union, and entitlement to its benefits in no way depends upon Railroad tort liability, whether the FELA or otherwise. Employees are entitled to the retirement benefits so long as the contractual requirements relating to age and time of service are met. Thus, that Newhard may have been motivated by his injury to retire, when he did is irrelevant. The key to the role that retirement payments should play in an FELA action depend rather on the purpose of the pension contract and not why employees choose to retire. In all of the cases which set off of fringe benefits were permitted, general non-set off rule was recognized, but the courts found that the employer-employee agreement expressly permitted set off. *See, e.g., Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir. 1984).

Thus, the assertion by PB&NE that the pension in this case is not a collateral source because "it is entirely funded

by and comes directly from" and that there "is no source independent of" PBN&E is misleading in two respects. First, it shows a misunderstanding of the reality of employment contracts. In a real sense, just like "there is no such thing as a free lunch", there is also "no such thing as a free fringe benefit". The fact that the employer makes payments to the fund as an initial matter does not mean that the employer is really the source of those payments. In reality, the payments are funded by the employee's labor, and are non-wage form of compensation.

III.

THIS COURT'S DECISION IN *NORTHFOLK AND WESTERN RAILWAY v. LIEPELT*, DOES NOT REQUIRE THAT RAILROAD RETIREMENT TAXES HE CONSIDERED WHEN CALCULATING PLAINTIFF'S WAGE LOSS.

Petitioner asserts incorrectly in its Brief, that it should have been allowed to illicit testimony from Newhard's expert actuary concerning payment of Railroad Retirement Tax. The Petitioner entirely misinterprets this Court's analysis in *Norfolk & Western Railway Co. v. Leipelt*, 444 U.S. 490 (1979). There, this Court merely held that evidence of income taxes might be relevant and for the jury to consider in making its award, along with an instruction concerning the fact that there will be no taxes on the award. In doing so, however, the court also noted that the introduction of such evidence must not, necessarily, be admitted in every case. *Leipelt*, 444 U.S. at 494. Moreover, Newhard offered evidence through his vocational expert that he was essentially disabled from all lines of employment, rail and otherwise, thus the relevance of the taxes further attenuated.

PB&NE did not present an economist or actuary to substantiate or dispute Newhard's wages, gross or net. The testimony was presented by Newhard's expert, who testified concerning the impact of taxes upon Newhard's past and future wage loss. PB&NE at no point, raised an objection to any of the testimony presented by Newhard during direct examination and did not bring the subject of the Railroad Retirement Tax up during cross-examination. It was not until re-cross examination that PB&NE's counsel attempted to cross-examine Newhard's economist on the effect of Railroad Retirement Taxes.[7]

Newhard presented the testimony of an actuary, which followed *Leipelt*, where the court noted: "Effective methods of presenting the essential elements of any expert calculation in a form that is understandable by juries . . ." 444 U.S. at 494. In the instant matter, the economist presented a calculation to the jury in the traditional manner, accounting for wage increases, taxes, discount rate and present value.

The PB&NE argues that in calculating employee's wages, the "net loss" should be determined after deduction of Railroad Retirement Board Taxes, citing *Leipelt*. There is a fundamental difference between the nature of income taxes and the nature of Railroad Retirement Board Taxes. Income taxes paid by an individual are 100% diluted in their impact on the individual, *i.e.*, no individual can trace any benefit to himself as a result of his payment of taxes. Railroad Retirement Board taxes, however, are different in that earnings and resulting taxes paid to the Railroad Retirement Board directly impact eligibility for benefits. When a railroad employee cannot keep paying Railroad

7. The District Court properly refused to allow PB&NE to re-cross examine the economist on Railroad Retirement Taxes.

Retirement Board taxes, he is impairing his eligibility for Railroad Retirement Board disability benefits. When an injured person cannot pay income taxes, other taxes are being paid, which help run the government. Thus, if the court is to deduct Railroad Retirement Board Taxes, it also opens the door to require a showing of the resulting loss to Newhard, leading to a likelihood of totally confusing the jury. This Court in *Leipelt* never intended for the deduction of social insurance taxes to be used in computing plaintiff's lost wages, past or future.

The Supreme Court of Virginia in *Norfolk & Western Railway Co. v. James L. Chittum*, 251 Va. 408, 468 S.E.2d 877 (1996), was confronted with the same identical issue presented here. The railroad in *Chittum*, argued that for the purpose of calculating Chittum's net wages under the [FELA], Tier 1 and Tier 2 retirement payments made by Chittum should be deducted from his gross wages. Again, the railroad relied on *Liepelt*, a wrongful death action brought under the FELA, where the Supreme Court held that with respect to the measure of damages, a railway company is entitled to present evidence of the effective income taxes on the decedent's estimated future earnings. 444 U.S. at 493-94. The court in *Chittum* stated:

> The Supreme Court, however, has never held that Tier 1 and Tier 2 payments toward retirement are to be treated the same as federal and state income taxes and, therefore, deducted to establish net income. Nevertheless, building upon *Liepelt*, N & W asserts that the retirement payments are congressionally mandated federal taxes and, therefore, like income taxes, should be deducted from gross income in determining

> damages. We do not agree. Even though retirement payments are mandated by Congress, we do not equate them with income taxes. Furthermore, N & W has not cited, and we have not found, a single FELA decision from either a federal or a state court holding that retirement payments should be deducted from gross income in calculating net income. We conclude, therefore, that the trial court did not err in rejecting N & W's contention."

251 Va. at 416, 468 S.E.2d at 882.

The Railroad Retirement tax is not a Federal Income Tax, as asserted by the railroad. The PB&NE cites no case directly supporting its position with regard to this issue. Further, PB&NE's reliance on *Hisquierdo v. Hisquierdo*, 439 U.S. 575 (1979), is entirely misplaced. This Court stated in *Hisquierdo* that compulsory Federal Taxes finance the Railroad Retirement Act Benefits rather than holding that deductions under the Railroad Retirement Act are compulsory federal taxes on income.

Moreover, the Trial Judge properly charged the jury that they should take into consideration NEW HARD's lost wages after taxes (App. 4a, *infra*) and the testimony concerning taxes was presented into evidence by Newhard's Economist, who took into consideration a conservative figure of 18% in reducing plaintiff's lost wages to their net value (J.A. 401-402). This testimony was not countered by any actuary or economist hired by the PB&NE in this case. Newhard presented testimony concerning Newhard's lost wages after taxes and the Trial Judge instructed the jury concerning same and therefore *Liepelt* was strictly followed in this case.

IV.

THIS PETITION FOR WRIT OF CERTIORARI IS MOOT DUE TO THE SETTLEMENT AGREEMENT REACHED BETWEEN NEWHARD AND PB&NE.

The final compelling reason for denying Petitioner's Writ of Certiorari in this matter is due to the fact that the case has already been settled. On February 9, 1999, the Court of Appeals affirmed the Judgment of the District Court in favor of Newhard. The Circuit Court issued its mandate on March 3, 1999. Thereafter, PB&NE filed a Motion to Recall the Mandate and Stay Execution of the Judgment pending disposition of a Petition for Writ of Certiorari to the Supreme Court. After response was filed by the Appellee in opposition to said Motion, the Circuit Court denied PB&NE's Motion to Recall the Mandate and Request for a Stay.

During the pendency of the Railroad's Motion to Stay Execution of the Judgment, counsel for PB&NE requested that counsel for Newhard refrain from executing on the Judgment until the Third Circuit ruled on the Stay Motion. In consideration for not executing on the Judgment, it was agreed between the parties that the matter would be settled for the total amount of Judgment plus interest and costs if PB&NE's Motion for Stay was denied by the Court of Appeals. On April 12, 1999, the parties were served with an Order dated April 9, 1999, wherein PB&NE's Motion for Stay was denied.

On April 15, 1999, PB&NE forwarded to the attention of Newhard's counsel the settlement draft for the amount of Judgment, interest and costs pursuant to the settlement

agreement. Thereafter, counsel for Newhard forwarded to counsel for PB&NE a Stipulation of Dismissal for filing with the District Court due to the settlement agreement reached between the parties. In breach of the above-referenced settlement agreement, PB&NE filed the instant Petition for Writ of Certiorari. Since the Judgment has been satisfied and settlement has been reached between the parties, it is clear that PB&NE's Petition for Writ of Certiorari is now moot.

Since the Judgment has been satisfied by the payment to Newhard in the amount of the Judgment plus interest and costs, it will be impossible for this Honorable Court to grant the relief requested by PB&NE in its Petition for Writ of Certiorari. This matter has been concluded by way of settlement between the parties and this Honorable Court should forthwith deny the instant Writ.

CONCLUSION

The decision by the District Court and the Third Circuit is in accord with *Eichel*, *Tipton* and with the many other Circuit Court decision which have addressed the same issue. There is obviously no conflict with this Court or other Circuit Courts of Appeals and no compelling argument has been presented that *Eichel* should be overruled. In addition, this Court's decision in *Leipelt* was not intended to allow Defendant Railroads to deduct the Railroad Retirement Tax in computing an injured workers' past and future lost wages. Such a result would deprive a railroad worker of a benefit earned over thirty years of employment. The tortfeasor railroad would conversely derive an undeserved windfall by reducing justly deserved compensation the injured railroad worker earned from a lifetime of work.

Finally, the Writ of Certiorari should be denied due to the fact that this matter has been settled and the Judgment is now satisfied.

Respectfully submitted,

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